No. 7986

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OAKLAND HOTEL COMPANY (a corporation),
Appellant,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF OAKLAND, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDMOND A. SOULE and JAMES A. WAINWRIGHT,
Appellees.

BRIEF FOR APPELLEES.

CHARLES A. BEARDSLEY,
Central Bank Building, Oakland,
ROBERT C. GREEN,
CHICKERING & GREGORY,
Merchants Exchange Building, San Francisco,
FITZGERALD, ABBOTT & BEARDSLEY,
Central Bank Building, Oakland,
Attorneys for Appellees.

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BRIEF FOR APPELLEES.

INTRODUCTORY STATEMENT.

The appellant's brief does not conform to Rule 24 of the Rules of this court. It contains no "concise abstract or statement of the case", as required by sub-paragraph (a) of Section 2, either with or without "presenting succinctly the questions involved and the manner in which they are raised". It contains no "specification of errors relied upon", as required by sub-paragraph (b). And the "brief of the argument" contains no "clear statement of the points of law or fact to be discussed", as required by sub-paragraph (c).

The total absence from the brief of any assignment of errors would appear to justify the disregarding of all alleged errors, as provided in Rule 24, Section 4. And the fact that this brief was filed after the time fixed for oral argument, when it is too late to remedy on argument defects in the printed presentation, would appear to be an added circumstance justifying the invoking of the provisions of the Rule.

Inasmuch as the appellant's statement of the case (if its "Statement of Facts", pages 1-21, is construed as being such a statement) is controverted, we shall present herein a concise statement of the case.

And the appellees' brief of the argument will present the following points, the pages upon which each point is presented being indicated in the subject index to this brief:

1. The decree of dismissal was in accord with the express direction of the statute;

2. There is no merit in the appellant's claim that there was no adequate hearing on the proposed plan;

3. There is no merit in the appellant's claim that the findings were insufficient;

4. None of the appellant's substantial rights were in any way affected by any of the alleged errors in procedure of which the appellant complains;

5. There was no error in the allowance to the bondholders' attorneys;

6. The court properly refused to make any allowance to the appellant's attorneys.

APPELLEES' STATEMENT OF THE CASE.

The appellant repeatedly asserts in its brief that the temporary trustee (who was formerly the receiver appointed by the state court) had opposed and obstructed the appellant's attempted reorganization. No part of the record is cited, and none can be cited, to sustain these assertions.

The appellant repeatedly asserts that the appellees and their attorneys are opposed to Section 77B, and have placed many obstacles in the way of such an orderly proceeding as is contemplated by the section. No part of the record is cited in alleged support of any of these assertions; and we understand that no such support can be found in the record.

The appellant repeatedly asserts that the appellees and their attorneys have consistently opposed *any* reorganization of the appellant, and have placed every possible obstacle in the way of *any* reorganization. No part of the record is cited in alleged support of these assertions, and the record clearly establishes the contrary.

At the close of an extended hearing before the special master, in December, 1934, the special master expressed doubt as to whether he should at that time recommend a dismissal of the debtor's petition, or should give the debtor a reasonable time within which to propose a reorganization plan; he called attention to the fact that the bondholders appearing before him (the present appellees owning $387,000 out of the $660,000 bond issue) probably could prevent reorganization by refusing to accept *any* plan proposed. Mr. Beardsley replied that the bondholders would not

take "any such position"; and the special master responded: "I knew you were too fair to do that" (Record, page 396).

After some further discussion along the same line, Mr. Beardsley stated the position of the bondholders, the appellees here (being the position consistently taken by the bondholders throughout these proceedings), as follows (Record, pages 402-403):

> "All I am interested in here is having this matter over with, organize or no organize, and give an opportunity to save as much as we can for the secured creditors * * * It does not make any difference to us whether this petition is dismissed * * * or whether you recommend that the debtor be given a time that may be suggested, a reasonable time, to present a plan to determine whether or not it is to continue further. In other words, I have no objection to the debtor's presenting a plan * * * We want to hear it, but we want to hear it quickly. In other words, we have sat by for three and one-half years and we have suffered with this property, we have worked for it * * * Now we say, that having sat by for three years and longer, while we have been trying to make these bonds worth a little more than thirty cents on the dollar, that if they have anything to say about saving us, for God's sake say it and get it over, and, if they haven't, get out of the way, and let us finish up the job we started three years ago."

Mr. Van Fleet replied (Record, page 404):

> "That is all very agreeable to me, if your Honor please."

And the special master replied (Record, pages 404-405):

> "That simplifies the matter * * * The truth of the matter is that (the) creditors * * * have been forebearing and have tried to give you a chance to work something out. I cannot help feeling that there is a limit to patience * * * I will be glad to take up with you tomorrow as (to) the time I should give you within which to present your plan."

Mr. Van Fleet replied (Record, page 405): "Very good". The time required was discussed with counsel; and by consent the debtor was given the full time requested by its counsel, within which to present its proposed reorganization plan (note that in its original petition, filed on October 18, 1934, the debtor had alleged that it then had "a tentative plan of reorganization that it will present to the court at the proper time"; Record, page 14).

The foregoing portions of the record furnish a complete answer to the appellant's claim that the appellees have prevented the appellant from availing itself of the provisions of Section 77B, and have opposed any and all reorganization, and that the appellant has had no opportunity to present a reorganization plan as contemplated by Section 77B.

Having been given all of the time that it had requested, the appellant presented its proposed reorganization plan (Record, pages 110-119).

This plan, the only one ever presented, is one that could not be approved by the court, under any circumstances.

Obviously, it could not be approved as a plan accepted by *two-thirds* of the secured creditors, since the appellees, owning a *majority* ($387,000 out of $660,000) of the bonds, expressly rejected it. Furthermore, not a single bondholder accepted it; and, after the bondholders' claims had been proved and at the hearing on the proposed plan, owners of $411,000 of the bonds voted "no" on the proposed plan (Record, pages 412-413). And, although the special master asked counsel for any acceptances by stockholders, Mr. Van Fleet refused to file any such acceptances (Record, page 413).

Consequently, the proposed plan could not possibly be approved, pursuant to subsection (e) (1), as one "accepted in writing" by two-thirds of each class of creditors, and by a like percentage of stockholders. The only possible chance for approval was under subsection (e) (1) (c), upon the theory that "provision is made in the plan for the protection of the interests, claims, or liens", and upon a finding, as provided in subsection (f), that "it is fair and equitable and does not discriminate unfairly", etc. The plan could not be approved, unless the provisions made for the bondholders were "completely compensatory" (*In re Muriel Holding Co.,* 75 Fed. (2d) 941; *Francisco Corp. Ltd. v. Battson,* decided by this court, Mar. 17, 1936).

Nowhere in the appellant's brief is there any suggestion that its proposed plan could be approved upon the theory that it was "completely compensatory", or upon any other theory; and a brief reference to the plan (Record, pages 110-119) will demonstrate that

it could not be approved upon any theory. In this connection, the following features of the proposed plan are controlling:

(1) It provides for a waiver for *fifteen years* of all provisions of the bond indenture for amortization, retirement and redemption of bonds (Record, page 112, Art. II, sec. 2);

(2) It provides for an extension of *fifteen years* of the due date of the $660,000 principal evidenced by the bonds (Record, page 115, Art. VI, sec. 1);

(3) It provides for an extension for *fifteen years* of the due date of the $205,000 past due interest (Record, page 115, Art. VI, sec. 1);

(4) It provides for a *reduction* of the 6% interest to 3% for seven and one-half years, to 4% for two years, and to 5% for six years—*a total reduction of interest in the sum of $214,500* (Record, page 113, Art. II, sec. 6);

(5) It provides that *the payment of even this interest,* reduced to the extent of $214,200, shall for five years be *dependent upon the success of the hotel* under the appellant's management (Record, pages 112-113, Art. II, secs. 3, 4, 5);

(6) It provides for *taking from the bondholders the possession and control of the bondholders' security,* and for placing it in the control of the debtor until July 1, 1942, even though in the meantime not one cent of interest or taxes is paid by the appellant (Record, page 113, Art. II, last paragraph);

(7) It provides that during this period, during which the appellant need not pay either any interest or any taxes, *it can borrow* (Record, page 115, Art. IV, sec. 4), *presumably using the bondholders' inadequate security as security for such borrowing,* and that it can continue thus to possess and to borrow on the bondholders' security (without paying taxes or interest), until July 1, 1942 (Record, page 113, Art. II, last paragraph).

All that the proposed plan offers to the bondholders, in lieu of their rights and interests of which it proposes thus to deprive them, is the following:

(1) 6600 shares of worthless common stock of the appellant (Record, page 114, Art. III, sec. 3);

(2) A minority participation in the appellant's management of the hotel (Record, page 115, Art. IV, sec. 1);

(3) The bulk of the remainder of the worthless stock after ten years, if the debtor does not pay interest equal to 6% (3% per annum) for the years 1943 and 1944 (Record, pages 114-115, Art. III, sec. 4).

Obviously, the proposed plan does not make any provision for the bondholders that is "completely" or otherwise "compensatory". It is neither "fair" nor "equitable"; it fails to provide "adequate" or any "protection for the realization" by the bondholders "of the value of their interests, claims, or liens"; and it is not "feasible". It merely provides for the use by the appellant of the bondholders'

inadequate security, in an undertaking that would be extremely hazardous for the bondholders, in a vague hope of salvaging something for stockholders, whose equities have been long since completely dissipated by the same management that it proffers to the bondholders.

The appellant suggests that the failure of its management was simply the natural result of the depression; and yet its own financial statements show that in the boom year of 1929 it lost $131,670.11, that it lost $163,628.19 in 1930, and that it lost $65,677.51 during the first four months of 1931 (Record, page 78).

The appellant has much to say about the propriety of giving it an opportunity to protect its "equity". And yet it is perfectly plain that it has no "equity".

All of its property is subject to the lien of the bond indenture; and the appellant expressly admits that the security is insufficient to pay the bond indebtedness in full. Thus, Mr. Jurgens testified (Record, page 380) that he considered that all accrued interest on the bonds "was already lost"; and, in the proposed reorganization plan (Record, page 114), the appellant refers to the interest accrued on the bonds as "lost interest since 1931". Furthermore, the appellant alleges in its petition (Record, page 11) that the bonds are "now selling at thirty cents on the dollar", which is less than the delinquent interest. And, in its brief (pages 30, 37), the appellant says that, if the bond indenture is foreclosed in the usual way, "the bondholders will receive nothing".

Under the foregoing circumstances, it appears to be a bit incongruous for the appellant to seek the aid of the courts to save its "equity". Admittedly, there is no "equity"; admittedly, the security is inadequate to protect the bondholders—those who have the first legal and moral right to that security. The pendency of these proceedings simply costs the bondholders money, and interferes with their exercise of their legitimate right to realize upon their security, and to minimize as much as possible their admitted and inevitable loss.

The appellant's "Statement of Facts" contains recitals of alleged grievances that serve no purpose, except perhaps to create an atmosphere. These recitals do not present "succinctly" or at all "the questions involved", or "the manner in which they are raised" (Rule 24, section 2, a). These recitals do not indicate that the questions suggested were raised at all in the lower court, or that they present any alleged reason for a reversal of the decree.

We have already referred to the appellant's alleged grievance, because of the alleged opposition of the temporary trustee, because of obstacles we are alleged to have put in the way of the appellant's realization of the benefits contemplated by Section 77B, and because of our alleged opposition to *any* reorganization.

The appellant complains (page 7) because the court appointed Mr. Beardsley attorney for Mr. Barker as temporary trustee, Mr. Beardsley having been attorney for Mr. Barker as receiver, and also one of the attorneys for the bondholders. But it is

not indicated that the appellant raised any question below in reference to this appointment, or that the appellant's alleged grievance in this regard has any pertinency upon this appeal.

The appellant complains (page 11), because, when at the appellant's request we attended a conference at the local office of the Reconstruction Finance Corporation, we "refused to commit" ourselves as to "how much the bondholders would take in cash or cash and stock for their claims", disregarding the fact that obviously we had no authority thus to bind the bondholders.

Apparently the appellant endeavors to make it appear that it had some proposal or commitment from the Reconstruction Finance Corporation, which the bondholders refused to consider. However, the record simply shows that the appellant approached the local representatives of the corporation, and that they gave it a courteous hearing (Record, pages 415-421). As pointed out by the Special Master (Record, page 426) it was merely shown that "Mr. Van Fleet thinks there is a possibility he could secure money from the Reconstruction Finance Corporation". The Special Master pointed out that, "if there were any commitment here to any particular amount or distinct recommendation to the Reconstruction Finance Corporation or its subsidiary organizations to actually lend the money, that it would lend any particlar amount on the property, then there would be something for Mr. Beardsley and Mr. Gregory to take up with their clients". Mr. Van Fleet replied: "That cannot be done until they agree what they will recommend to

the bondholders". The Special Master replied (Record, page 427): "I am not inclined to force them into a position to do that. I will not tell them that they must make an offer to you. You see, you are the person here who is to put up the plan of reorganization; you put one up; that has been rejected, it has not been approved at least. Now, you have no other plan to offer".

There is nothing in the appellant's alleged grievance, because of the reception given to its suggestion that it might secure a loan from the Reconstruction Finance Corporation, that lends any support to its appeal from the decree of dismissal.

Having presented the foregoing statement of the nature of the case, we shall now present the brief of the appellees' argument, setting forth our reply to the points made in the appellant's brief, and the reasons why the decree should be affirmed, under the headings mentioned in our introductory statement, supra, and on the pages indicated in the subject index.

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1. THE DECREE OF DISMISSAL WAS IN ACCORD WITH THE EXPRESS DIRECTION OF THE STATUTE.

Section 77B, subsection (c) (8) provides that, "if the plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or, if proposed and accepted, is not confirmed", the judge "may, after hearing * * * either extend such period or dismiss the proceeding under this section" * * *

A reorganization plan was proposed. A time was duly fixed, within which it might be accepted; and the appellant makes no complaint that the time was inadequate. The plan was not accepted by the required two-thirds of the creditors and stockholders, or by any of the creditors or stockholders. The plan proposed was not confirmed; and it was not a plan that could have been confirmed. Because of the absence of both an acceptance and a confirmation, the statute says that the judge could "dismiss the proceeding"; and it was dismissed as provided in the statute.

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2. **THERE IS NO MERIT IN THE APPELLANT'S CLAIM THAT THERE WAS NO ADEQUATE HEARING ON THE PROPOSED PLAN.**

The appellant complains that there was no hearing on its proposed reorganization plan (pages 26-27). But the record does not support the claim.

The proposed plan was presented on February 14, 1935 (Record, pages 110-119). On March 6, 1935, it was set for hearing on March 26, 1935 (Record, pages 119-121). Notice was duly given of the hearing (Record, pages 121-127), in the manner agreed to in writing by the appellant (Record, page 119). The bondholders' written opposition to the plan was filed on March 20, 1935 (Record, pages 128-131).

Thereafter, there was due reference to the special master who had already conducted a full hearing in December, 1934, and further notice was given, and

various hearings, formal and informal, were conducted by him (Record, pages 407-409).

Finally, on June 3, 1935, there was a hearing before the special master (Record, pages 409-439) pursuant to notice duly given.

At the June 3, 1935, hearing, the special master asked if the reorganization plan was regularly before him for "consideration at this time"; Mr. Beardsley replied that it was, and Mr. Van Fleet did not reply (Record, page 412). Thereupon, the hearing proceeded. The bondholders made a showing that bonds of the face value of $411,000 were proved by formal claims on file, with powers of attorney running to the attorneys for the appellees, and that the holders of all of these bonds voted "no" on the approval of the proposed plan (Record, pages 412-413). The showing was further made that there was no acceptance on file by any creditor or by any stockholders (Record, page 412). There was the discussion as to the possibility of securing a loan from the Reconstruction Finance Corporation, which discussion was referred to in our statement of the case, supra.

The appellant made no showing whatever in support of its proposed plan; in fact, every one conceded that the proposed plan was acceptable to no one except to the appellant. The appellant confined its showing to one in support of further delay so that it might carry on further negotiations for a Reconstruction Finance Corporation loan (Record, pages 413-431).

Counsel for the bondholders insisted that there had already been too much delay, that the appellant had

already been given much more time to present a reorganization plan or plans than it had theretofore stipulated would be sufficient, and that the matter should be presently disposed of (Record, page 422).

Finally, the following discussion took place between the special master and counsel (Record, page 435):

> "The Master. I have not made up my mind what my recommendation is going to be yet.
>
> Mr. Van Fleet. *I don't want to take any more time.*
>
> The Master. If it is submitted, I will decide on Friday.
>
> Mr. Van Fleet. *Submitted as far as I am concerned.*
>
> Mr. Beardsley. As far as we are concerned."

(The italics here, and elsewhere herein unless otherwise stated, are ours.)

In re H. W. Clark Co., 79 Fed. (2d) 681, was a proceeding under Section 77B. Appealing bondholders complained that they were given no opportunity to be heard on the approval of the proposed reorganization plan. The court pointed out however that they gave no notice of their desire to be heard, or to introduce further evidence; and the court concluded (page 684):

> "It is clear from the facts stated that no opportunity was *denied* appellants to be heard on the issues referred to or any pertinent issue."

All that was lacking in the hearing on the proposed reorganization plan was that no one said anything *in favor* of the proposed plan. In fact, the appellant does not say anything in favor of its proposed plan, even in

its brief. When the matter was regularly set and noticed for hearing, the appellant (the moving party) made no showing whatever, and agreed that the matter might be *submitted* without any showing in favor of the plan, and upon the showing of unqualified and unanimous rejection by the bondholders. It should be perfectly obvious that the appellant has no right upon appeal to urge that the special master erred in not giving it any further hearing. It received all the hearing that it asked for; and it does not now suggest that, even if it had asked for more and received what it asked for, it could have made *any* showing in favor of its proposed plan. The plan was so palpably unsound and unfair that it could not have availed the appellant anything, regardless of the length of the hearings thereon, if it had requested further hearings.

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3. THERE IS NO MERIT IN THE APPELLANT'S CLAIM THAT THE FINDINGS WERE INSUFFICIENT.

The appellant objects to the form of the reports of the special master, and particularly to the absence of special findings. The appellant fails to indicate, however, any issue as to which there should have been any special finding, except only that the appellant asserts that the special master should have found the value of its "equity".

In our statement of the case, supra, we have pointed out that, under the undisputed and admitted facts, there is no "equity".

Furthermore, the special master found in substance that there is no "equity". We refer to the finding in

the report of December 27, 1934 (Record, pages 89, 91):

> "2nd. Paragraph III of the creditors' answer is true. That is to say, the bonds owned by the creditors stated in said Paragraph III are of the face value of $387,000 *and that said creditors have provable claims which amount in the aggregate in excess of the security held by them (namely, the security of said bond indenture) to more than $1,000.*"

This finding was rendered necessary, because the answering creditors were all bondholders, and were not otherwise creditors, and because Section 77B, subsection (a), only permitted answers by creditors "who have provable claims against any corporation which amount in the aggregate, *in excess of the value of securities held by them*, if any, to $1,000 or over".

Paragraph III of the bondholders' answer alleged the excess of the indebtedness over the value of the security; and the issue was fully tried before the special master.

The only experienced appraiser who testified was R. W. Kittrelle (Record, pages 266-272); and he fixed the reasonable market value of the hotel property at $526,000 (Record, pages 267-268). It was subject to tax liens, and to the bond indenture securing bonds in the principal sum of $660,000, besides four years (now nearly five and one-half years) of delinquent interest.

Therefore, there was an adequate finding by the special master that the value of the entire property of the appellant was less than the amount of the tax and bond liens. And there is no basis for the appel-

lant's complaint that the special master did not find the value of its "equity"—in effect, *the special master found that there was no equity;* he found what Mr. Jurgens admitted in his testimony (by his admission that the delinquent interest was "already lost") and what is admitted in the reorganization plan (by the reference to "lost interest"), and in the appellant's petition (by its allegation that the bonds were selling "at thirty cents on the dollar"), and in the appellant's brief (by its assertion that upon foreclosure "the bondholders will receive nothing").

If there were anything lacking in the findings, either as to the value of the hotel property or otherwise, the appellant waived its right to complain thereof, because it failed to request any special findings.

The appellant's brief expressly admits (pages 31, 33) that Rule 46 of the Rules of the local District Court applied to this proceeding.

This rule provides that the master's report "may be in the form of an opinion"; and the master's reports were in that form (Record, pages 89-97; 170-174).

This rule provides further that, *"if requested by either party",* the master's report shall "embody special findings * * * upon the ultimate or probative facts in issue" * * * *The appellant requested no special findings;* and, therefore, it waived its right, if it had any, to any further finding as to the value of the hotel property, and to any further special findings on any other issue.

The appellant objects because the District Court did not make findings as provided in Rule 70½ of the Equity Rules.

This rule applies to "deciding suits in equity". General Order XXXVII makes the Equity Rules applicable *"In proceedings in equity,* instituted for the purpose of carrying into effect the provisions of the act", namely, the Bankruptcy Act, "or for enforcing the rights and remedies given by it" * * *

Appellant cites no authority holding that the Equity Rules apply to the summary proceeding provided for in Section 77B. In *In re Crumney,* 225 Fed. 426, 428, the court held that the above general order *"applies only to equity proceedings, properly so called,* and not to summary proceedings in bankruptcy like this", and that, in summary proceedings in bankruptcy, "the court is not limited by the technical rules of procedure in equity".

The following cases are to the same general effect:

Bradley v. Huntington, 277 Fed. 948, 950;

In re Hughes, 262 Fed. 550;

International Harvester Co. v. Carlson, 217 Fed. 736;

Daniel v. Guaranty Trust Co., 285 U. S. 154, 163-164, 76 Law. Ed. 675, 681.

But, if the general order applies to such proceedings as this, it is abundantly settled that the court's findings may be in the form of an opinion:

Amiesite Asphalt Co. v. Interstate Amiesite Co., 4 Fed. Suppl. 504;

American Can Co. v. M. J. B. Co., 52 Fed. (2d) 904;
Briggs v. U. S., 45 Fed. (2d) 497;
Parker v. St. Sure, 53 Fed. (2d) 706.

The decree of the court confirmed the reports of the special master (Record, pages 221, 222); and these reports, in the form of opinions, were a sufficient compliance with Rule 70½, if that rule is applicable to this proceeding.

Furthermore, if the appellant was entitled to further findings, it waived them by failing to request them seasonably.

Such a waiver is impliedly provided for by local Rule 46, requiring special findings "if requested by either party".

And, in *American Surety Co. v. Cotton Belt Levee No. 1,* 58 Fed. (2d) 234, 235, the court ruled:

> "The request for findings and conclusions filed after the court had acted is unavailing as coming too late."

We respectfully submit that there is no merit in the appellant's complaints that the findings by the special master were not more full and complete, either on the issue as to the value of the appellant's "equity" or otherwise, or that the court did not make findings in addition to those made by the special master.

4. NONE OF THE APPELLANT'S SUBSTANTIAL RIGHTS WERE IN ANY WAY AFFECTED BY ANY OF THE ALLEGED ERRORS IN PROCEDURE OF WHICH THE APPELLANT COMPLAINS.

Even if there were any technical merit in any of the appellant's objections to the procedure either before the special master or before the District Court, this circumstance would not justify a reversal of the decree dismissing the petition.

Section 269 of the *Judicial Code* (28 U. S. C. A. sec. 391) provides that judgment on appeal shall be given "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties".

This court said in *Hoogendorn v. Daniel,* 202 Fed. 431, 433:

> "Unless it can be seen that prejudice has resulted from error in the trial court, prejudice will not be presumed."

Even if there were a prima facie presumption of prejudice from error, the undisputed facts definitely establish that none of the appellant's substantial rights were in any way affected by the alleged defects in the procedure, of which it now complains.

No further hearing on the proposed reorganization plan, no matter how prolonged that hearing may have been, could have resulted in a confirmation of that plan by any decree of the court, because it was utterly impossible for the appellant to secure an acceptance of the plan by 66⅔ of the secured creditors ($411,000 out of $660,000, or 62%, expressly rejected the pro-

posed plan), and because the plan, not being "completely" or otherwise "compensatory", could not be confirmed by the court without the bondholders' consent. Therefore, no "substantial rights" of the appellant were affected by the inadequacy, if any, of the hearing on the proposed plan.

No finding that either the special master or the court could have made, either relating to the value of the appellant's "equity", if any, or otherwise, could have resulted in an acceptance or confirmation of the proposed plan, or in any other termination of the proceedings, except a termination by a decree of dismissal. Therefore, no "substantial rights" of the appellant were affected by a deficiency, if any, in the findings.

This proceeding was one of the first prosecuted under Section 77B in this particular District Court. Neither the court, nor the special master, nor the parties, had the benefit of any well-defined rules of procedure, established either in that court, or in any other court, or otherwise. The appellant's present points as to appropriate procedure are in the main, if not wholly, simply the result of afterthoughts, all suggested on purely technical grounds, for the purpose of prolonging proceedings that can serve no useful purpose, and that have already been prolonged much too long.

Because the alleged errors in procedure do not affect the appellant's "substantial rights", and irrespective of the lack of technical merit in the appellant's complaints as to the procedure, such complaints

furnish no possible justification for a failure to affirm the decree dismissing the appellant's petition.

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5. THERE WAS NO ERROR IN THE ALLOWANCE TO THE BONDHOLDERS' ATTORNEYS.

Chickering & Gregory and Fitzgerald, Abbott & Beardsley, attorneys for the bondholders, petitioned the court for an allowance of $5000 compensation and $262.20 expenses (Record, pages 187-198). As far as the record shows, no one objected to the granting of the petition; and it was granted (Record, pages 223-224).

Counsel concede (page 38) that counsel for the bondholders "certainly earned their money as far as the amount of work was concerned", and that counsel for the appellant are "not greatly concerned with the allowance". In fact, it is not apparent that the appellant is *at all* concerned with the allowance to the bondholders' attorneys, since it came out of the bondholders' inadequate security, and not out of funds in which the appellant can have any real interest.

It does not clearly appear upon what grounds the appellant asks this court to review the order making this allowance. However, counsel state (page 39) that "It now transpires under all the authorities that * * * the attorneys for creditors and special interests are not entitled to fees out of the estate but must look to their clients"; and they cite a number of recent cases in alleged support of this proposition.

While the authorities cited lend support to counsel's proposition, as far as concerns allowances to attorneys for *"special interests"*, they lend no support as far as concerns an allowance to attorneys for *"creditors"*. And it is an allowance to attorneys for *"creditors"* that is being here discussed.

Section 77B (c) (9) expressly provides for the allowance of compensation and expenses to *"parties in interest* * * * and * * * representatives of *creditors* * * *, *and the attorneys* * * * of any of the foregoing".

The attorneys in question appeared formally upon behalf of bondholders owning $411,000 out of $660,000; they acted upon behalf of *all* the bondholders; and no one else appeared on behalf of *any* of the bondholders. Obviously, the bondholders are "parties in interest", within the meaning of the statute—they are by far the most vitally interested of any parties taking part in the proceeding. Furthermore, they are "creditors", within the meaning of the statute. And these attorneys are attorneys for "parties in interest" and for "creditors".

Instead of lending any support to counsel's claim that allowances may not properly be made to attorneys rendering such services as those rendered by these attorneys, the authorities cited by counsel establish the contrary.

Thus *In re Hertz,* 81 Fed. (2d) 511 (cited by counsel as 571), laid down the rule that the lower court has a "very broad discretion" in awarding and in refusing to award compensation, and that it is proper to reward "faithful and necessary service with reason-

able compensation". It also pointed out that compensation should not be allowed for service rendered "strictly in the interest of an individual or group of individuals"; and it declined to interfere with the discretion of the lower court in refusing to make any allowance to attorneys for a particular group of creditors, because it could not say that the services of such attorneys did not fall in this latter class. The court concluded:

> "Every case must stand upon its own bottom and is subject to the exercise of a sound judicial discretion by the trial court, subject to review in the event of abuse".

In re Flamingo Hotel Co., 81 Fed. (2d) 749, cited by counsel, simply affirmed an order denying compensation to an *architect* for *unauthorized* services.

In re Selton National Fibre Can Co., 13 Fed. Suppl. 83, cited by counsel, simply held that no allowance should be made to attorneys who rendered service in furthering the *personal interest of an individual creditor.* The court said on page 85:

> "Services that are to be compensated by the debtor are those rendered primarily and directly for the purpose of effecting a rehabilitation of the debtor, *and, if that is found to be impossible, then in preserving the assets* for liquidation, and not services rendered in the interest of some individual stockholder or creditor".

In re Kelly Springfield Tire Co., 13 Fed. Suppl. 724, cited by counsel, makes liberal allowances to attorneys for all parties, and lays down the rule (page 729) that

> *"just allowances must be made to those who have performed services which have inured to the benefit of the parties in interest".*

And *In re Kentucky Eectric Power Corp.*, 11 Fed. Suppl. 528, cited by counsel, held that the attorneys for the bondholders were entitled to an allowance of $7500.

None of the cases cited by counsel lend any support to their suggestion that the allowance to the attorneys for the bondholders in this proceeding was improper. Furthermore, the cases cited furnish sufficient authority for such allowance, if any authority were necessary in addition to the express authorization contained in the statute. In any event, there is no pretense of any showing, either of any abuse of discretion in the making of the allowance, or that the appellant did not expressly consent to the making of the allowance, or that the appellant, which concedes that it is "not greatly concerned with the allowance", is at all concerned with the allowance.

We respectfully submit that the order making the allowance of compensation and expenses to the attorneys for the bondholders should be affirmed.

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6. THE COURT PROPERLY REFUSED TO MAKE ANY ALLOWANCE TO THE APPELLANT'S ATTORNEYS.

Robbins & Van Fleet, the attorneys for the appellant, filed a petition asking for $10,000 compensation

and $420.60 expenses (Record, pages 203-207). The bondholders filed written opposition to the making of any allowances whatever to these attorneys (Record, pages 215-221). And the petition was denied (Record, page 224).

The petitioners, Robbins & Van Fleet, have not appealed; but Oakland Hotel Company, their client, has included the denial of its attorneys' petition among the matters of which it complains (pages 38-39). However, neither argument nor authority is presented in support of the complaint of this denial.

Two sufficient reasons why the petition was properly denied were pointed out in the bondholders' opposition (Record, pages 216-219, 220-221), and may be briefly listed as follows:

(1) The petition does not comply with General Order in Bankruptcy XLII, in that it is accompanied by no affidavit as required by that General Order. It is there provided: "In the absence of such affidavit * * * no allowance of compensation shall be made * * *". In a recent 77B proceeding, *In re Celotex Co.*, 13 Fed. Suppl. 1011, 1015-1016, it was held that the absence of the affidavit precluded the granting of compensation.

(2) It is undisputed that there is no estate from which any allowance of compensation or expenses could be made except the bondholders' inadequate security; and the law is definitely settled that the attorneys for the debtor cannot be compensated out of such security:

7 *Corpus Juris,* page 437(78) and 438(83), section 782;
In re Goldville Mfg. Co., 123 Fed. 579;
In re Elmore Cotton Mills, 217 Fed. 808;
In re Markshoe, 289 Fed. 74;
In re Green, 23 Fed. (2d) 889;
Robinson v. Dickey, 36 Fed. (2d) 147.

Furthermore, as shown by the authorities discussed in the next preceding subdivision of this brief, the exercise of the trial court's discretion in granting or refusing allowances will not be reviewed, in the absence of a showing of an abuse of such discretion. And, in the appellant's brief, there is no appearance of any showing of any such abuse. In fact, the record clearly shows that the services rendered by the attorneys for the appellant were not such as to have justified the granting of any allowance of either compensation or expenses, particularly since any allowance could have come from no source other than the bondholders' security.

We respectfully submit that there is no merit in the appellant's complaint of the refusal of the trial court to make any allowance to the appellant's attorneys.

CONCLUSION.

We respectfully submit that the decree dismissing the proceeding, and the orders dealing with allowances to counsel, should each be affirmed.

In the summer of 1931, the appellant refused to continue the operation of Hotel Oakland, the property that is subject to the bondholders' indenture and the only property belonging to the appellant. Since January, 1932, the property has been in the possession of a receiver appointed by the state court in an action prosecuted by the trustee under the bond indenture (except during the period that the same person held the property as temporary trustee appointed herein).

During this period of nearly four and one-half years, the bondholders have assumed sole responsibility for the operation and protection of the property, in an effort to minimize as much as possible their already heavy loss. The bondholders have received no interest since January 1, 1931—a period of nearly five and one-half years. The appellant alleges that their bonds are selling at thirty cents on the dollar—less than enough to pay the delinquent interest.

The appellant is hopelessly bankrupt. According to its own showing, it has neither assets nor the possibility of assets sufficient to enable it to deposit the cost of printing the record on its appeal. There is not even a remote possibility of its reorganization. And the further prolongation of these proceedings cannot result in any legitimate advantage to it. It can only serve to place further obstacles in the way of the realization by the bondholders of a part of that to

which they are entitled, as a result of their investment in the appellant's bonds.

An affirmance of the decree and of the orders, from which the appeals are prosecuted, would appear to be required, by the undisputed facts, by the provisions of Section 77B, and by long-established rules governing appellate procedure.

Dated, Oakland,
June 12, 1936.

Respectfully submitted,
CHARLES A. BEARDSLEY,
ROBERT C. GREEN,
CHICKERING & GREGORY,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Appellees.